physiological effects similar to GHB * * * suffices to demonstrate scienter with respect to the second prong of the analogue definition (actual or intended similar physiological effect)," but "it is not equivalent to finding *knowledge* of actual chemical similarity." Pet. App. 19a. On that point, the court commented that the evidence at trial was sufficient to support a finding of such knowledge, but that such a finding was not compelled. *Id.* at 20a. The court held, however, that petitioner's conviction nonetheless should not be reversed because "Congress has specifically identified GBL as an analogue of GHB" and "DEA regulations * * * specify that '[GBL] and [GHB] are *structurally and pharmacologically similar to GHB*.'" *Id.* at 20a-21a (quoting 65 Fed. Reg. 21,645 (2000) and citing *United States* v. *Ansaldi*, 372 F.3d 118, 123 (2d Cir. 2004) ("GBL is one of the substances that the statute actually identifies as a potential controlled substance analogue."), cert. denied, 125 S. Ct. 364 and 430 (2004), and *United States* v. *Fisher*, 289 F.3d 1329, 1336 (11th Cir. 2002), cert. denied, 537 U.S. 1112 (2003) (legislative statements and DEA regulations identify GBL as an analogue of GHB)). The court of appeals concluded that those congressional and regulatory pronouncements were "sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue." Pet. App. 21a. In those circumstances, the court held, petitioner, "having acknowledged that he *knew* he was selling substances containing GBL, * * * cannot then turn around and claim that he had no knowledge of GBL's status as an analogue of GHB." *Id.* at 21a-22a. The court explained that "[a]s with other known controlled substances * * *, knowledge of the substance's specific identity implies knowledge of the substance's legal sta-

tus," and "[i]gnorance of the relevant legal provisions is no defense." *Id.* at 22a. Accordingly, the court stated, "any error in the district court's scienter instructions [was] harmless." *Ibid.*

ARGUMENT

Petitioner contends that this Court's review is warranted because the court of appeals applied a mistaken harmless-error analysis to the omission of what he contends was a necessary scienter element in the instructions given to the jury. Further review is unwarranted. Although the court of appeals articulated a harmless-error rationale in finding no reversible error, its judgment is correct quite apart from harmless-error principles because it is sufficient to convict a defendant of a controlled substance analogue violation involving GBL that the jury found that the defendant "*knew* he was selling substances containing GBL." Pet. App. 21a. There is no need for this Court to review any purportedly mistaken articulation of harmless-error standards in the opinion. The Seventh Circuit has, on many occasions, demonstrated that it correctly understands the harmless-error test laid down in *Neder* v. *United States*, 527 U.S. 1 (1999), when the jury instructions omit an element of an offense. For the same reason, there is no conflict between the law on harmless error in the Seventh Circuit and the law on harmless error in this and other courts. And because the court's rationale does not appear to turn on a conclusive presumption of knowledge, this Court's mandatory presumption precedents are not implicated.

1. The court of appeals correctly noted that defendants charged with a controlled substance violation ordinarily must be shown to have known that the sub-

stance involved is a controlled substance. Pet. App. 14a. Generally, the defendant's knowledge of the identity of the substance—heroin, cocaine, marijuana, etc. —is sufficient to make that showing. *Id.* at 14a-15a. Thus, in ordinary prosecutions for possessing a controlled substance with intent to distribute it under 21 U.S.C. 841(a)(1), the government need not prove the defendant's knowledge of the precise chemical composition of the substance he possessed.

Under the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. 813, a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." Accordingly, when a defendant is charged with possessing GBL—a controlled substance analogue—with intent to distribute it, the ordinary scienter requirement under Section 841(a)(1) applies. Just as a defendant charged with possessing heroin, cocaine, or marijuana need be shown only to have known the identity of the substance he possessed and need not be shown to have known anything about the chemical composition of that substance, a defendant charged with possessing GBL need be shown only to know that he possessed GBL with the intent that it be used for human consumption and need not be shown to have known anything further about its chemical composition.

Based on that analysis, the jury's verdict contained all of the findings necessary to support petitioner's convictions on Counts 2 and 5. The court of appeals noted that "[t]he jury specifically found that [petitioner] knew the substance he possessed contained GBL." Pet. App.

20a.[4] The jury was instructed that it must find that petitioner "knowingly and intentionally possessed mixtures containing GBL," and that "[i]t does not matter whether the defendant knew the substance was a controlled substance, *only that it was a mixture containing GBL*." Gov't Instruction No. 25, at 29 (emphasis added). In those circumstances, as is the case with heroin, cocaine, marijuana, or other controlled substances, "knowledge of the substance's specific identity implies knowledge of the substance's legal status." Pet. App. 22a. The jury's findings were sufficient to satisfy the statutory scienter requirement.

2. The court of appeals did purport to announce a more general rule that to be convicted of an offense involving a controlled substances analogue, the defendant "must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance." Pet. App. 18a. Although the court spoke generally about that questionable knowledge-of-chemical-similarity requirement in controlled substance analogue cases, the court also recognized—as have other courts—that "Congress has specifically identified GBL as an analogue of GHB," and that "DEA regulations also specify" that GBL and GHB are "pharmacologically similar." Pet. App. 20a-21 (quoting 65 Fed. Reg. at 21,645).[5] See *United States* v. *Ansaldi*, 372

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[4] The court noted that "the jury also found that [petitioner] intended or represented that GBL has similar physiological effects to GHB." Pet. App. 22a n.7.

[5] Petitioner argues (Pet. 16 n.3) that the DEA regulation cited by the court of appeals does not compel the conclusion that GBL is a controlled substance analogue, but only provides that GBL "may satisfy" the definition of a controlled substance analogue "under certain circumstances." *Ibid.* (quoting Pet. App. 21a and 65 Fed. Reg. at 21,645).

F.3d 118, 123 (2d Cir. 2004), cert. denied, 125 S. Ct. 364 and 430 (2004); *United States* v. *Fisher*, 289 F.3d 1329, 1336 (11th Cir. 2002). In those circumstances, the court agreed with the Second Circuit that "there is one thing [the laws governing controlled substances] make perfectly clear—the sale of GBL for human consumption is illegal." Pet. App. 21a (quoting *Ansaldi*, 372 F.3d at 122). The court concluded that "such pronouncements [from Congress and the DEA] are sufficient to put any drug merchant on notice that GBL qualifies as a controlled substance analogue," *ibid.*, and the court accepted that, at least in GBL cases, the scienter required is the same as the scienter required for any other violation of Section 841. See *id.* at 22a ("As with other known controlled substances * * *, knowledge of the substance's specific identity implies knowledge of the substance's legal status.").[6]

In light of its discussion, the precise breadth of the court of appeals' knowledge-of-chemical-similarity rule is unclear, and the correctness of that rule is not at issue in any event. The court concluded in this case that proof of such knowledge is not necessary in a GBL case.

Those "circumstances" are surely present here, where the drug was being distributed for human consumption and the jury found that petitioner represented or intended that GBL has similar physiological/psychological effects as GHB. With respect to the issue of the similarity of chemical structure between GLB and GHB, the regulation states unequivocally that GBL is "structurally and pharmacologically similar to GHB." Pet. App. 21a (quoting 65 Fed. Reg. at 21,645).

[6] Although the court of appeals later stated that it found any deficiencies in the instructions harmless, see Pet. App. 22a, the court did not explain how, in light of its conclusion that the scienter requirement is the same for GBL offenses as for offenses involving other controlled substances, there was error in the scienter instructions in this case at all.

At the very least, the drug 1,4 butanediol—which was also originally charged in this case under the name "BD," see note 2, *supra*—would appear to be on a par with GBL. See *United States* v. *Roberts*, 363 F.3d 118, 123-124 (2d Cir. 2004). While the court stated that the instructions in this case might constitute reversible error in unspecified other controlled substance analogue prosecutions, this case does not present any question about whether a more stringent scienter requirement or a knowledge-of-chemical-similarity requirement should be applied in cases *not* involving GBL.

3. Petitioner's primary contention is that the "[t]he Seventh Circuit found that the omission from jury instructions of a contested element of the offense constituted harmless error," and that that finding "contradicts opinions of this Court and the law of at least three sister circuits." Pet. 6 (citing, *inter alia*, *Neder* v. *United States*, 527 U.S. 1 (1999)). There is no reason for this Court to review the Seventh Circuit's understanding of *Neder* in this case.

While the court of appeals criticized the jury instructions in this case and purported to rest its decision on the conclusion that "any error" in the instructions was "harmless," see Pet. App. 22a; see also *id.* at 20a ("any deficiencies * * * harmless"), the court ultimately found no reversible error because it concluded that Congress and the DEA had clearly identified GBL as a controlled substance analogue and thus that a defendant's knowledge that a substance is GBL is sufficient to prove scienter. See, *e.g.*, *id.* at 21a-22a ("Thus having acknowledged that he *knew* he was selling substances containing GBL, [petitioner] cannot then turn around and claim that he had no knowledge of GBL's status as an analogue of GHB."); *id.* at 22a ("knowledge

of the substance's specific identity implies knowledge of the substance's legal status"). The court's opinion thus cannot be understood, as petitioner claims, as a general holding that the omission of a seriously contested element from jury instructions can be harmless error. Rather, the court's holding turned on its specific conclusion that, where Congress itself has identified a particular substance as a controlled substance analogue, any deficiencies that existed in the jury instructions on scienter did not amount to reversible error.

If a defendant were required to have actual knowledge that a particular substance had a chemical structure substantially similar to that of a controlled substance in *every* prosecution for a controlled substance analogue, then the fact that Congress had specifically identified GBL as a controlled substance analogue would not constitute conclusive proof that a defendant had actual knowledge of chemical similarity. While there is some ambiguous language in the court's opinion, see Pet. App. 21a, the thrust of the court's analysis appears to be that in a GBL case, no further finding on scienter is required as a matter of law once the defendant is shown to have known that a substance is GBL. *Id.* at 22a. That conclusion does not rest so much on analysis under *Neder* (which the court did not cite) or on the application of a conclusive presumption (which the court did not articulate)[7] as it does on an understanding of the statutory status of GBL in the controlled substance analogues law.

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[7] Petitioner's attribution (Pet. 15-19) to the court of appeals of having applied such a conclusive presumption is particularly unwarranted because the court elsewhere (Pet. App. 18a-19a n.4) recognized that such presumptions are constitutionally problematic.

Petitioner is mistaken in claiming (Pet. 9) that the instant case conflicts with *Powell* v. *Galaza*, 328 F.3d 558 (9th Cir. 2003), *United States* v. *Prigmore*, 243 F.3d 1 (1st Cir. 2001), or *United States* v. *Brown*, 202 F.3d 691 (4th Cir. 2000). In each of those cases, the court found that there was an instructional error omitting or materially misstating an element of the offense charged and that the error was not harmless in light of the evidence in the case. None of those cases involved the scienter requirements applicable to GBL-based controlled substance analogue prosecutions, and, therefore, they did not involve the unique statutory context involved in this case. Moreover, the Seventh Circuit has elsewhere consistently applied a correct understanding of harmless-error principles.[8] It is thus clear

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[8] See, *e.g.*, *United States* v. *Ramsey*, 406 F.3d 426, 432 (7th Cir. 2005) (finding omission from jury instructions of element that the defendant must act "knowingly and intentionally" in a prosecution for maintaining a drug house to be harmless under *Neder*; "if the evidence is so strong that a jury would have reached the same verdict absent the erroneous jury instruction, then the error is harmless"), cert. denied, 540 U.S. 1227 (2004); *United States* v. *Knight*, 342 F.3d 697, 712 (7th Cir. 2003) (citing *Neder*, 527 U.S. at 10-11, and finding any alleged error in jury's failure to find foreseeable drug quantity for each defendant harmless under test that asks "whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error") (internal quotation marks omitted); *United States* v. *Souffront*, 338 F.3d 809, 836 (7th Cir. 2003) (finding omission of unanimity instruction on predicate acts in CCE prosecution harmless; "[w]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless") (quoting *Neder*, 527 U.S. at 17), cert. denied, 540 U.S. 1201 (2004); *United States* v. *Swan*, 250 F.3d 495, 499 (7th Cir. 2001) (finding omission of operation-or-management instruction in RICO prosecution not harmless "[b]ecause

that there is no genuine conflict in the circuits on the meaning of *Neder*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

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the record does not contain overwhelming evidence that Swan managed or operated the enterprise," such that it is not "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error") (quoting *Neder*, 527 US. at 18).

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IN THE

Supreme Court of the United States

JAMES R. TURCOTTE,

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v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Remarkably, the Government never confronts the central question presented by the petition—that is, whether the omission of a hotly contested element of an offense from the jury's consideration can ever be harmless. The Government does not deny that the Seventh Circuit's application of harmless error analysis to such an error contravenes this Court's decision in *Neder* and creates a split of authority among the circuits. This Court's intervention is necessary to resolve the split and restore uniformity on this important issue.

Apparently mindful that the Seventh Circuit's harmless error analysis plainly contradicts the authority of this Court,

the Government attempts to recast the issue entirely. Rather than defend the Seventh Circuit's harmless error analysis, the Government contends that the decision below "is correct quite apart from harmless-error principles" on the theory that the omission of the element from the jury's consideration was not error after all. Resp. Br. 9. Thus, the Government suggests that the Seventh Circuit was incorrect on another point as well—the test for scienter in a case involving a controlled substance analogue.

The Seventh Circuit unequivocally found that the "normal" scienter requirement applicable to controlled substances—that is, that knowledge of illegality is presumed and, therefore, mere possession is enough to show scienter—does not apply in analogue cases. Instead, according to the Seventh Circuit (and a majority of courts of appeals that have considered this issue), the defendant must also *know* that the substance in question is a controlled substance analogue. The Government now argues exactly the opposite, claiming, without citation to authority, that the ordinary scienter requirement applies to analogue cases as well as controlled substances cases. This argument is belied not only by the Seventh Circuit's extensive analysis but also by the plain language of the statute and common sense. And in any event, to the extent that there is any doubt about the Seventh Circuit's decision on this issue, it too merits further review by this Court, given the difference of opinion on this issue between the Seventh Circuit and others, on the one hand, and the Eleventh Circuit and the Solicitor General on the other.

The Government addresses the second issue presented in much the same manner. The Government does not, and cannot, contest that the use of a conclusive presumption to satisfy a contested element of a criminal offense contravenes the authority of this Court and, of course, the Fifth and Sixth Amendments. Rather than argue otherwise, the Government simply claims that the Seventh Circuit applied no such pre-

sumption. That is incorrect. Regardless whether the Seventh Circuit used the magic words "conclusive presumption," the court clearly found that the omission of the instruction on scienter (that the defendant must know that the substance was an analogue of a controlled substance) was "harmless" because such knowledge (according to the court) could be presumed from pronouncements that GBL was illegal. Petitioner never had an opportunity to rebut this presumption and thus it was conclusive. The Seventh Circuit's analysis thus contravenes the requirement that a jury decide each contested element of the offense. Given the importance of this issue, and its clear departure from this Court's recent precedents, certiorari on this issue is appropriate as well.

ARGUMENT

I. THE HARMLESS ERROR ISSUE IS WORTHY OF THIS COURT'S REVIEW.

Instead of contesting the merits of the first issue presented, the Government claims first that the court's opinion "cannot be understood, as petitioner claims, as a general holding that the omission of a seriously contested element from jury instructions can be harmless error." Resp. Br. 14. As shown below, this is a flat misreading of the decision. Moreover, the Government has failed in its effort to establish that this case is not a good vehicle with which to address this manifestly important issue.

A. The Seventh Circuit's Decision Creates A Split Of Authority With Regard To The Application Of Harmless Error Analysis When An Element Of The Offense Is Contested.

As a predicate to its harmless error analysis, the Seventh Circuit devoted no fewer than seven pages to explaining why the district court's scienter analysis was in error. Pet. App. 13a-20a. The court ultimately concluded that the instructions should have required a showing "that the defendant knew the

substance in question was a controlled substance analogue." Pet. App. 18a. The jury was specifically instructed to "forego" making that determination, and, thus, according to the Seventh Circuit, the instruction was "incomplete" and "highly misleading." Pet. App. 20a. The court acknowledged that this issue was contested at trial and that it was incapable of weighing contradictory evidence on the topic or making credibility determinations. Pet. App. 20a n.5. Nevertheless, the court found that "given the clear Congressional and regulatory pronouncements of the status of GBL, any error in the district court's scienter instructions were harmless." Pet. App. 22a.

In summary, the Seventh Circuit did exactly what the Government claims it did not do: it squarely held that the omission of the knowledge element from the scienter instruction was harmless error, even though that element was admittedly contested at trial.

The Government makes much of the fact that "the court's holding turned on its specific conclusion that, where Congress itself has identified a particular substance as a controlled substance analogue, any deficiencies that existed in the jury instructions on scienter did not amount to reversible error." Resp. Br. 14. True, the Seventh Circuit's decision that the error was "harmless" was based upon the congressional pronouncements, Pet. App. a, but that is of no moment. The Seventh Circuit's reasoning as to *why* the error was harmless does not change the fact that the court held the error *was* harmless. In other words, the Seventh Circuit could have deemed the error harmless for any number of reasons, but that would not have changed the court's ruling that it is appropriate to find the omission of a genuinely contested element from jury instructions "harmless."

The Government is correct that the appellate court's ruling did not explicitly flout *Neder v. United States*, 527 U.S. 1 (1999), but that is of no consequence. Instances in which

courts of appeals openly disagree with the precedents of this Court are rare. More often, it is the actual decision or judgment of the lower court that unwittingly contradicts this Court's jurisprudence, as is the case here. Regardless whether the appellate court cited or even analyzed *Neder*, its decision contradicts it. *Neder* states that the omission of a contested element from a jury instruction *is not* harmless, and, of course, the Seventh Circuit found that the failure to instruct on scienter *was* harmless, even though the court admitted that the element was genuinely contested.

Remarkably, the Government asks the Court to ignore this contradiction because it contends that the Seventh Circuit has elsewhere "consistently applied a correct understanding of harmless-error principles[,]" citing several cases. Resp. Br. 15. Yet not one of the cases cited by the Government dealt with whether the failure to include a *contested* element in a jury instruction was harmless; in fact, in each of the cited cases, the element was *uncontested*. So while the Seventh Circuit may generally understand harmless error principles, this appears to be the first instance in which the Seventh Circuit has addressed this precise issue—that is, whether the omission of a contested issue from jury instructions can ever be harmless. And, as discussed above, the court's opinion in this case stands squarely for the proposition that it *can* be harmless.

Finally, the Government's only discussion of the three cases[1] that conflict with the Seventh Circuit on the harmless error issue is to say that they did not deal with the statutory context here, without ever explaining why that makes any difference. The particular statutory context is of no consequence; each of those cases held that if jury instructions omit

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[1] *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001); *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000); *Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003).

a contested element of the offense, the error cannot be harmless. Of course, the Seventh Circuit here found to the contrary. For all these reasons, this Court's review of the first issue presented is appropriate.

B. This Case Is An Appropriate Vehicle By Which To Reach The Harmless Error Issue.

The Government next implies that this case does not present an appropriate vehicle for resolving the harmless error issue for three reasons: (i) the error here was not an error at all; (ii) the Seventh Circuit's ruling was limited to GBL cases; and (iii) evidence existed to demonstrate that the Petitioner was aware of the illegality of GBL. As described below, these arguments are without merit, and none should preclude this Court's grant of certiorari on the first issue presented here.

1. The Ordinary Scienter Requirement Does Not Apply to Analogue Cases.

The Seventh Circuit was right to conclude, based upon the applicable statutory context, that knowledge that the substance at issue is an analogue of a controlled substance is required for criminal liability. To the extent there is any dispute about this, however, the issue is independently worth of this Court's review.

The Seventh Circuit found that the district court's instructions as to scienter were "incomplete" and "highly misleading" as to the prerequisites for liability under the Analogue Provision. Pet. App. 20a. The underlying problem was that the instructions applied the ordinary scienter requirement—that is, that knowledge of possession of the substance is enough for criminal culpability and knowledge of the illegality of the substance is presumed—when the instructions should have provided that the defendant must have known that "the substance in question was a controlled substance analogue." Pet. App. 18a.

The Government directly attacks this conclusion, claiming that the result in the case was appropriate because no error occurred. In fact, the Government contends that the "ordinary scienter requirement"—i.e., that the Government need only establish knowledge of the substance's identity—applies to analogue cases as well as controlled substances cases.

But the Government cites no authority to support this proposition. And, in fact, the proposition is directly contradicted by well established authority, the statutory language, and common sense.

As the Seventh Circuit explained, the ordinary scienter requirement, used in cases involving drugs that are "*per se* illegal" such as "cocaine, heroin and the like," is inapplicable in analogue cases. Pet. App. 14a. With drugs such as cocaine and heroin, illegality is fairly implied or presumed. But "[h]ere, and in other analogue cases under § 802(32)(A), the opposite is true—many newly engineered and relatively unknown substances may be involved such that knowledge of the substance's identity does not automatically imply knowledge of its status as a controlled substance." Pet. App. 15a. The practical import of this distinction is that in cases involving drugs that are *per se* illegal, the Government need only prove possession because knowledge of illegality is fairly presumed, but when the drug is not specifically scheduled and is instead criminalized because it is an analogue of a controlled substance, some knowledge of illegality (for example, that the substance is an *analogue* of a controlled substance) is required. The Seventh Circuit imposed this burden recognizing "that requiring the government to prove scienter as to these criteria may impose a significant prosecutorial burden in some cases." Pet. App. 18a. But that is what the statute requires.

In any case, the issue highlighted by the Solicitor General merely makes certiorari all the more appropriate. In describing the error in the instructions, the Seventh Circuit

acknowledged that there was a split in authority on this issue. Pet. App. 16a.

Specifically, the Seventh Circuit cited the law of the First and Second Circuits as supporting the requirement that the defendant know the substance was an analogue of a controlled substance (or other knowledge of its criminality). Pet. App. 15a (citing *United States v. Hussein*, 351 F.3d 9, 17 (1st Cir. 2003), and noting that in that case the court required that "the defendant [] know both that he possessed Khat *and* that Khat in turn contained the controlled substance cathinone."); Pet. App. 16a (citing *United States v. Roberts*, 363 F.3d 118, 123 n.1 (2d Cir. 2004), and quoting the opinion as stating that the Analogue Act "requires the Government to show that the defendants knew that they possessed a controlled substance"). The court also cited language in an Eleventh Circuit case that arguably supports the Government's position here. The Seventh Circuit quoted *dicta* from *United States v. Carlson*, 87 F.3d 440, 443 n.3 (11th Cir. 1996) as describing "the absence of a scienter requirement in the Analogue Act[.]" Pet. App. 16a. The *dicta* is now supported by the position of the Solicitor General in its brief opposing certiorari in this case.

Thus, the First, Second, and Seventh Circuits are now on one side of the equation, whereas the Eleventh Circuit and the Solicitor General are on the other. In short, the Solicitor General's position supports, rather than undermines, the need for this Court's plenary review.

2. The Seventh Circuit Announced A General Rule Of Scienter That Applies In All Analogue Cases.

The Government also attempts to minimize the import of the Seventh Circuit's opinion by claiming that the scienter rule established in the case is merely applicable to GBL cases. Specifically, the Government contends that "this case

does not present any question about whether a more stringent scienter requirement or a knowledge-of-chemical-similarity requirement should be applied in cases *not* involving GBL." Resp. Br. 13 (emphasis in original). This is untrue for several reasons.

First, the rule established by the Seventh Circuit expressly applies to all analogue cases. The Seventh Circuit stated in unequivocal terms that to sustain a conviction in analogue cases, "[a] defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects." Pet. App. 18a. That is now the law of the Seventh Circuit for all analogue cases.

Second, the Government's claim that the existence of congressional pronouncements moots the need to provide a knowledge instruction in an analogue case involving GBL is misplaced. The Government emphasizes that the Seventh Circuit "agreed with the Second Circuit that 'there is one thing [the laws governing controlled substances] make perfectly clear—the sale of GBL for human consumption is illegal.'" Resp. Br. 12. This statement is both false and irrelevant. Unlike drugs that are *per se* illegal, GBL is not a Schedule I substance. Rather, as the court itself recognized, GBL is criminalized only by virtue of the fact that it is an analogue of a controlled substance. The implication is that "[a] substance's legal status as a controlled substance analogue is not a fact that a defendant can know conclusively *ex ante*; it is a fact that the jury must find at trial (applying the three clauses of the Analogue Provision)." Pet. App. 16a.

At Petitioner's trial, as at every trial involving an analogue, the Government actually had to prove that GBL was an analogue of GHB, which it attempted to do by presenting expert testimony that the substances were "substantially similar" chemically and in their physiological effects. Tr. at 505-26.